IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1996] SGCA 35

CA 153/1994

Between

Star-Trans Far East Pte Ltd

… *Appellant*

And

Norske-Tech Ltd

… *Respondent*

GROUNDS OF DECISION

Arbitration — Stay of court proceedings; Civil Procedure — Stay of proceedings

Version No 1: 29 Oct 2026 (23:45 hrs)

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Star-Trans Far East Pte Ltd v Norske-Tech Ltd and Others

[1996] SGCA 35

CA 153/1994
Karthigesu JA; L P Thean JA
21 May 1996

1 Cur Adv Vult

2 This is an appeal against part of a decision of the High Court granting the first and second respondents` application for a stay of proceedings pending a reference to arbitration and setting aside ex parte orders relating to a bank guarantee issued by Banque Indosuez.

3 ***The facts***

4 The material facts are as follows. The appellants (Star-Trans), a Singapore company, carry on the business of freight forwarders. A written contract (contract 6021) dated 24 February 1993 was entered into between Star-Trans, jointly with the third respondents (Speditor), and the first respondents (Norske-Tech). The purpose of contract 6021 was for Star-Trans and Speditor (described in the contract collectively as the forwarder), to organize ocean carriage of plant and equipment from various parts of the world to the construction site of a proposed pulp and paper mill in Riau, Indonesia. Norske-Tech (described in contract 6021 as the owner) had undertaken the construction of the paper mill.

5 The second respondents (PT Riau) furnished a performance guarantee (the performance guarantee), contained within a document described as a `supply contract` to secure Norske-Tech`s performance of their obligations under contract 6021. PT Riau irrevocably guaranteed Norske-Tech`s performance and undertook to pay the forwarder if Norske-Tech should fail to pay them all amounts which were due to be paid by Norske-Tech under contract 6021. The performance guarantee bore the signature of Star-Trans as well as Norske-Tech and PT Riau. However, it was not signed by Speditor even though it was jointly addressed to them.

6 Two other proceedings were commenced in September 1993, prior to the institution of the present action. First, Norske-Tech brought S 1864/93 against Star-Trans to obtain urgent delivery of cargo in the possession of Star-Trans under a purported lien over the cargo. Secondly, Star-Trans commenced S 1898/93 against the three respondents to the present action. According to the endorsement of claim, S 1898/93 was a claim for, inter alia, freight, expenses, and charges for services rendered pursuant to contract 6021, and damages for Norske-Tech and PT Riau`s breach of duties under contract 6021, and/or against PT Riau under the performance guarantee.

7 After the above two actions had been commenced, Star-Trans` solicitors wrote to Norske-Tech`s solicitors on 8 October 1993. It is best to set out the terms of this fax transmission in full:

> *We refer to the various proceedings which have been instituted in court over this matter.*

8 As you are aware, in the Contract No 6021 dated 24 February 1993 (the contract) made between our respective clients, there is a provision which

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requires that all disputes arising out of or in connection with the contract to be referred to arbitration on the terms stated therein.

9 Hence we are concerned and suggest that both parties should, at this juncture, come to an agreement on the future conduct of this matter. We propose that the issues relating to demurrage, costs, expenses and the alleged breaches of the contract should be referred to arbitration. As for the present proceedings which have been instituted, these could be stayed or discontinued once all the ancillary matters have been resolved. Further, we would propose that for the purpose of saving of costs, an arbitration in a manner other than under the ICC Rules be agreed between the parties and that this be conducted in Singapore.

10 We will be obliged if you could take your clients` instructions and revert to us on the aforesaid.

11 The arbitration clause in contract 6021 reads:

> *Any disputes arising out of or in connection with this contract shall be finally settled by arbitrators, without recourse to the courts, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed under such rules. The findings of the arbitrators shall be binding on the parties and enforceable in any court of competent jurisdiction.*

12 This contract shall be governed by and construed in accordance with the laws of England.

13 The place of arbitration shall be Singapore.

14 Performance of the contract shall continue during the arbitration proceedings. No payment due or payable to forwarder by owner shall be withheld on account of pending reference to arbitration.

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15 On 19 October 1993, Norske-Tech`s solicitors wrote to enquire whether Speditor would be similarly inclined to refer the matter to arbitration. As far as Star-Trans were concerned, the proposed arbitration could proceed without Speditor being made a party to the arbitration proceedings. By another fax dated 27 October 1993, Star-Trans` solicitors informed the solicitors for Norske-Tech that Speditor had indicated that they were `not interested in the dispute` and they had only been made a nominal party by Star-Trans. Norske-Tech`s solicitors responded with another fax dated 1 November 1993 informing Star-Trans` solicitors that Norske-Tech would be holding Speditor jointly liable together with Star-Trans for any loss or damage suffered by reason of Star-Trans` non-performance of their obligations under contract 6021. Norske-Tech intimated that they would make Speditor a party to the arbitration proceedings even if Star-Trans did not intend to do so. Finally, Norske-Tech`s solicitors maintained that their clients` instructions were to refer their claims against Star-Trans and Speditor to arbitration `pursuant to the terms of [contract 6021], namely, under the ICC Rules`.

16 Norske-Tech`s solicitors wrote to Star-Trans` solicitors on 8 March 1994, notifying them that Professor Peter Wetterstein of Finland had been nominated as an arbitrator. Star-Trans were not agreeable to the appointment of a foreign arbitrator. There was apparently nothing in the ICC Rules to prevent the appointment of a foreign arbitrator. Star-Trans` solicitors thus responded on 17 March 1994 requesting an explanation for the arbitrator`s `special qualifications that necessitate his appointment over that of a resident of Singapore`. Norske-Tech`s solicitors replied on 21 March 1994. They stated that the reason for their choice of Professor Wetterstein would be apparent once the request for arbitration was forwarded to Star-Trans` solicitors. They also opined that Star-Trans` apparent objection to their choice of arbitrator was on

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the ground of costs only, and that, in any case, it was not for Star-Trans to dictate who Norske-Tech`s arbitrator should be. No further correspondence ensued. Star-Trans issued the writ in the present action (S 660/94) on 25 April 1994.

17 ***The present action (S 660/94)***

18 Star-Trans` writ in S 660/94 was indorsed with the following principal claims and reliefs. First, Star-Trans sought to claim freight, expenses, charges for services rendered, interest and all other sums payable by Norske-Tech/PT Riau in connection with contract 6021, as well as damages for breaches of Norske-Tech/PT Riau`s duties under the contract, and all sums payable by PT Riau under the performance guarantee, which are not the subject matter of Suit No 1898 of 1993. In addition, Star-Trans sought a declaration that Norske-Tech/PT Riau were `not entitled to invoke and/or encash and/or howsoever call, demand, or make any request for payment on the Banker`s Guarantee No 1530-0243-59 dated 8 March 1993 for US$200,000 issued by Banque Indosuez (the BI Guarantee) naming Norske-Tech as beneficiaries`. Star-Trans later obtained an ex parte injunction restraining Norske-Tech/PT Riau from calling on or dealing with the BI Guarantee.

19 Norske-Tech/PT Riau applied to stay all further proceedings in the present action on the ground that Star-Trans had agreed to submit the disputes between them to arbitration, and to set aside the ex parte injunction relating to the BI Guarantee. The High Court granted both these applications. Star-Trans have appealed against only the first order for a stay of proceedings, and the consequential order for them to pay Norske-Tech/PT Riau the costs of the application.

20 The High Court`s judgment is reported at [1995] 3 SLR 631 .

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21 ***The appeal***

22 The main issues that arise on appeal have been characterized by Star-Trans` counsel as follows:

> (i) whether Norske-Tech/PT Riau have satisfied the requirements for a stay of proceedings under s 7 of the Arbitration Act (Cap 10) (the Act); and
>
> (ii) whether the court ought, in exercising its discretion or under its inherent jurisdiction, to stay the proceedings.

23 **(1) The arguments in relation to PT Riau specifically**

24 (i) PT Riau as an additional party to contract 6021

25 The learned judge held that under the performance guarantee, PT Riau were implicitly made an additional party to contract 6021. The judge opined:

> *[The performance guarantee] is not a guarantee in the usual sense of the expression because the word guarantee is used in a wide sense. Additionally, it imposes liabilities and confers rights on [PT Riau]. It is not a novation because [Norske-Tech] are not discharged from their liability. Under the performance guarantee [PT Riau] acquire [Norske-Tech`s] rights and assume their liabilities while [Norske-Tech`s] rights and liabilities continue their parallel existence. The true effect of the performance guarantee therefore is to implicitly make [PT Riau] an additional party to the contract. Their liabilities and rights were joint and several ... Accordingly [PT Riau] are entitled to call on [Star-Trans] for an arbitration and are obliged to submit to arbitration if asked to do so by [Star-Trans].*

26 The learned judge found that this construction was fortified by the fact that PT Riau had joined forces with Norske-Tech to assert their rights under the contract in S 1898/93. Star-Trans raised no objection on the ground that PT Riau had no such rights.

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27 Counsel for Star-Trans submitted that the performance guarantee did not implicitly make PT Riau a party to contract 6021. PT Riau specifically did not wish to be a party to contract 6021, hence necessitating two separate contracts. In addition, for PT Riau to be treated as a party to contract 6021, the agreement of all the original parties to that contract had to be obtained. Speditor never signed the performance guarantee and thus never agreed to PT Riau being added as a party.

28 Referring to the terms of the performance guarantee itself, the relevant provisions in cl 3 state:

> *The forwarder [ie Star-Trans and Speditor] irrevocably agrees that all the rights of Norske-Tech Ltd under the contract* ***may*** *be exercised by PT Riau and all the obligations of Norske-Tech Ltd shall be discharged* ***if*** *performed by PT Riau, and without prejudice to the generality of the foregoing, the rights of Norske-Tech Ltd under the contract* ***may at any time be assigned*** *to PT Riau. [Emphasis added by Star-Trans.]*

29 Counsel for Star-Trans submitted that by cl 3, PT Riau were only given the liberty to exercise Norske-Tech`s rights or to perform Norske-Tech`s obligations under contract 6021. This was akin to a form of power of attorney. Clause 2 of the performance guarantee states:

> *In consideration of [Star-Trans and Speditor] entering into the contract with [Norske-Tech], [PT Riau] irrevocable [sic] guarantees the performance undertakes to pay to [Star-Trans and Speditor] if [Norske-Tech] fails to pay them all amounts which are due to be paid by [Norske-Tech] under the contract.*

30 Thus, if PT Riau so desired, they could discharge the obligations of Norske-Tech. They were under no obligation to discharge any of Norske-Tech`s liabilities. Their only obligation arose from their undertaking in cl 2 to pay all amount due under the contract. Star-Trans had no right to look to PT Riau to discharge Norske-Tech`s obligations in general. There was no express

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assignment of Norske-Tech`s rights or liabilities to PT Riau. As Star-Trans were claiming against PT Riau based on the performance guarantee and not contract 6021, PT Riau cannot insist that Star-Trans submit such a claim to arbitration.

31 In response, counsel for Norske-Tech/PT Riau contended that cl 3 meant that `all rights` of Norske-Tech under contract 6021, including the right to refer disputes arising between the parties to arbitration, would be exercisable by PT Riau. By agreeing that PT Riau would be entitled to assert all rights of Norske-Tech and to discharge all obligations of Norske-Tech under contract 6021, Star-Trans had accepted that PT Riau would be regarded as an additional party to contract 6021.

32 The question raised was whether the performance guarantee had been properly construed to have the effect of implicitly making PT Riau an additional party to contract 6021. We concur with the learned judge`s view that the performance guarantee `is not a guarantee in the usual sense of that expression`. The usual textbook sense of the term `guarantee` is that it is a binding promise of one person to be answerable for the debt or obligation of another if that other defaults (Philips & O`Donovan, ***The Modern Contract of Guarantee*** (2nd Ed, 1992) p 8). It is apparent from cl 3 that the terms of the performance guarantee extend beyond this sense. The learned judge went on to opine that the performance guarantee `imposes liabilities and confers rights` on PT Riau. Under it, PT Riau `acquire [Norske-Tech`s] rights ***and assume their liabilities*** while [Norske-Tech`s] rights and liabilities continue their parallel existence` [Emphasis added]. Their liabilities and rights were joint and several. The learned judge considered that the performance guarantee would implicitly make PT Riau an additional party to contract 6021.

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33 With great respect to the learned judge, we are not persuaded by his reasoning. Under the performance guarantee, Norske-Tech continues to bear the principal obligation of payment, while PT Riau assumes a secondary obligation. Clause 3 clearly has the effect of permitting PT Riau to exercise Norske-Tech`s rights and perform Norske-Tech`s obligations. In the event of such exercise or performance, the effect is to discharge Norske-Tech`s obligations under contract 6021. There was no novation and Norske-Tech were not discharged from their obligations. There was also no express assignment of Norske-Tech`s rights to PT Riau.

34 As counsel for Star-Trans has rightly pointed out, PT Riau is not primarily responsible for the entire range of Norske-Tech`s obligations. PT Riau had the liberty to choose which obligation under contract 6021 it wished to discharge. Thus, there is no question of PT Riau assuming Norske-Tech`s liabilities, or of Norske-Tech and PT Riau assuming joint and several liability. PT Riau`s only primary obligation was to pay up all amounts which Norske-Tech might fail to pay under contract 6021 (see cl 2 of the performance guarantee). Star-Trans had no right to look to PT Riau directly to discharge Norske-Tech`s obligations under contract 6021. If there is any room at all for an argument that PT Riau were effectively an additional party to the contract, it must be on the premise suggested by the learned judge, namely, that PT Riau have acquired all of Norske-Tech`s rights and assumed all of Norske-Tech`s liabilities, while Norske-Tech`s rights and liabilities continue their parallel existence. Clearly, cl 3 did not have this effect. Finally, Speditor were not a signatory to the performance guarantee.

35 In our judgment, it would not be appropriate to read into cl 3 anything wider than what it suggests on a plain reading. We agree with counsel for Star-Trans that cl 3 should be construed to operate in a manner akin to a power of

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attorney only. Consequently, it does not have the effect of implicitly making PT Riau an additional party to the contract.

36 (ii) Distinction between disputes arising under contract 6021 and under the performance guarantee

37 A second argument raised by Star-Trans is that the claim brought against PT Riau relates to the latter`s obligations under the performance guarantee. This is `separate, distinct and independent from any claim which [Star-Trans] have against [Norske-Tech] under contract 6021`. While accepting that Norske-Tech and PT Riau may be able to enforce such rights as they have jointly under contract 6021 by virtue of cl 3 of the performance guarantee, counsel for Star-Trans contended that PT Riau cannot insist that disputes arising under the performance guarantee be submitted to arbitration. The learned judge`s finding that PT Riau are implicitly a party to contract 6021 only deals with PT Riau`s rights to call for arbitration in relation to disputes under contract 6021.

38 The agreement to refer disputes to arbitration is contained in cl 10.8 of contract 6021, the relevant portions of which state:

> *Any disputes arising out of or in connection withthis contract shall be finally settled by arbitrators, without recourse to the courts, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by three arbitrators appointed under such rules.*

39 Clause 10.8 is worded broadly. Notwithstanding our rejection of the proposition that PT Riau were effectively an additional party to contract 6021, we note that cl 3 of contract 6021 expressly permits PT Riau to exercise all of Norske-Tech`s rights under contract 6021. In a sense, the boundaries between contract 6021 and the performance guarantee are somewhat less clearly defined

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than in the ordinary case where the guarantee stands entirely on its own as a collateral undertaking.

40 Counsel for PT Riau has argued that PT Riau`s alleged liability under the performance guarantee is tied up with the disputes between Star-Trans and Norske-Tech. At first blush, it may appear anomalous that the parties should not have intended that all their disputes, whether arising under contract 6021 or the performance guarantee, should be capable of being referred to arbitration, to be decided in a single forum. However, we need not express any conclusive views on this matter. The main question is whether the arbitration clause in cl 10.8 can be said to have been validly incorporated by reference into the performance guarantee. The same process of distinguishing between the two contracts will have to be considered in addressing this question, to which we now turn.

41 (iii) Incorporation of the arbitration clause by reference

42 Counsel for PT Riau contended that cl 10.8 of contract 6021 (the arbitration clause) was duly incorporated as a term of the performance guarantee by reference, by virtue of PT Riau`s entitlement to exercise all of Norske-Tech`s rights, pursuant to cl 3. Star-Trans challenged this proposition, founding their contentions on maritime law cases where the question was whether an arbitration clause in a charterparty was incorporated in the bill of lading. It is well-settled from those cases that the courts will construe words of incorporation used in bills of lading narrowly (see the leading authority of ***TW Thomas & Co Ltd v Portsea Steamship Co Ltd, The Portsmouth*** [1912] AC 1). Star-Trans` principal argument was that there are no appropriate or clear words of incorporation in the performance guarantee which suffice to encompass the arbitration clause. Specific reference to the arbitration clause is required before it can be incorporated.

43 The relevant words of incorporation relied upon by PT Riau are contained in cl 3 of the performance guarantee, which provides that `all rights` of Norske-Tech may be exercised by PT Riau. Star-Trans contended that these words are insufficiently clear to establish an agreement to arbitrate between Star-Trans and PT Riau. In addition, the arbitration clause may be considered a `collateral term`, relating to something not germane to the actual performance of contract 6021. Reliance was placed by Star-Trans on ***The Varenna; Skips A/S Nordheim v Syrian Petroleum Co*** [1983] 2 Lloyd`s Rep 592. In this case, it was held that general incorporating words had to be construed restrictively to incorporate only conditions and exceptions as were appropriate to the carriage and delivery of goods. As a matter of construction, the words would not extend to a collateral term such as an arbitration clause even if that clause was expressed in terms which were capable of referring to the bill of lading. On this basis, the reference to `all rights` in cl 3 of the performance guarantee can only refer to rights which are germane to contract 6021, ie rights in relation to the actual performance of the carriage.

44 Counsel for Norske-Tech/PT Riau pointed out that perhaps the only reason why the bill of lading cases have traditionally adopted a strict and restrictive approach towards incorporation is that `a bill of lading is a negotiable commercial instrument and may come into the hands of a foreign party with no knowledge and no ready means of knowledge of the terms of the charterparty` (per Bingham LJ in ***Federal Bulk Carriers Inc v Itoh & Co Ltd; The Federal Bulkers*** [1989] 1 Lloyd`s Rep 103, at p 105). Even so, it may be noted that the principle that specific reference to the arbitration clause is required has been adopted by the English courts in other contexts such as construction (***Aughton Ltd v MF Kent Services Ltd*** [1992] ADRLJ 83) or reinsurance contracts (***Pine Top Insurance Co Ltd v Unione Italiana Anglo Saxon Reinsurance Co Ltd***

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[1987] 1 Lloyd`s Rep 476; ***Excess Insurance Co Ltd and Home and Overseas Insurance Co Ltd v Mander*** [1995] LRLR 358). In ***Aughton*** `s case, Sir John Megaw stated the following three policy reasons for adopting the strict approach from the bill of lading cases:

> (a) clear language is required to oust the jurisdiction of the courts;
>
> (b) the statutory requirement for an arbitration agreement to be in writing (see s 2 of the Act) was a clear indication that a party was to be regarded as relinquishing access to the courts lightly;
>
> (c) an arbitration clause is an independent and self-contained contract, and is not to be regarded as merely another term in the main contract which can be incorporated by reference to that main contract.

45 These views have been reflected in the reinsurance cases cited above. Merkin (***Arbitration Law*** (1991) para 4.22) has thus opined that `the general policy of the law as regards the purported incorporation by general wording of arbitration clauses in other contracts must be regarded as firmly settled`. Merkin goes on to note:

> *The approach taken by the courts is that the arbitration clause in the charterparty between owner and charterer is not, in the absence of clear wording, to be incorporated into the contract evidenced by the bill of lading as between owner and consignee. The rule is probably not confined to bills of lading cases, and it has been held in other contexts that an arbitration clause in a contract between A and B is not to be incorporated by reference into a contract between B and C unless clear words of incorporation are used.*

46 In an earlier decision, ***The Merak*** [1965] 1 All ER 230, the bill of lading sought to incorporate `all the terms, conditions, clauses and exceptions including cl 30 contained in the charterparty`. The arbitration clause was in fact cl 32. It appears to have been accepted that there had simply been misnumbering in the incorporating clause, a fact demonstrated by the wording of the

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charterparty arbitration clause which itself provided that it was to be incorporated into bills of lading issued under the charter. The Court of Appeal held that the words of incorporation were sufficiently wide to encompass cl 32, when taken with the express reference to the bill of lading in the arbitration clause itself.

47 Having regard to the particular circumstances of ***The Merak*** , perhaps there is no real inconsistency with the usual approach adopted in the bill of lading cases. Nevertheless, it may be noted that the Court of Appeal approached the question by asking whether the incorporating words were `sufficiently wide`. It may be that this approach will no longer be favoured. The prevailing view seems to be that the relevant inquiry should be whether the incorporating words are `sufficiently clear (or specific)`.

48 Reverting to the present case, on a broad interpretation, it may be argued that the reference to `all rights` in cl 3 may include the right to refer disputes to arbitration, contained in cl 10.8 of contract 6021. From the terms of the performance guarantee, it is clear that PT Riau`s liability is contingent upon Norske-Tech`s failure to pay Star-Trans `all amounts which are due to be paid by [Norske-Tech]` under contract 6021. Nonetheless, the fact remains that the disputes which may be referred to arbitration must be disputes `arising out of or in connection with` contract 6021, and not the performance guarantee. Notwithstanding our observation earlier that the boundaries between the two contracts may not be entirely clear, the performance guarantee is still a separate and distinct contractual undertaking.

49 The dispute between PT Riau and Star-Trans relates solely to the former`s obligations under the performance guarantee. As far as PT Riau are concerned, unless they can be considered a party to contract 6021, we are of the

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opinion that they are not entitled to resort to invoking the arbitration clause in contract 6021 to resolve a dispute relating to the performance guarantee. There is no clear indication that this will be consistent with the parties` intentions. To hold that the arbitration clause is incorporated by reference would represent a movement away from what appears to be the prevailing judicial policy towards the issue of incorporation, as accepted by the English courts. We see no reason why this policy should not be adhered to. In the circumstances, we hold that the incorporating words relied upon by PT Riau are not sufficiently clear to permit incorporation of the arbitration clause by reference.

50 **(2) The arguments in relation to both Norske-Tech and PT Riau**

51 We need only address two of the arguments put forward by Star-Trans. The first is that Norske-Tech (and, a fortiori, PT Riau) have waived the right to arbitrate by reason of their conduct. Secondly, there was no fresh agreement to arbitrate.

52 (i) Waiver of the right to arbitrate

53 Star-Trans contended that by reason of the conduct of Norske-Tech in commencing S 1864 /93 and in the events which followed those proceedings, they had waived their right to refer the proceedings to arbitration. The learned judge opined that there were two reasons why this argument was flawed. First, the suit was commenced for the principal purpose of obtaining an order for urgent delivery of the cargoes in Star-Trans` possession under a purported lien. Secondly, Norske-Tech could not have achieved that object in arbitration proceedings. Star-Trans` action was oppressive and the only effective remedy was for Norske-Tech to commence proceedings and obtain a mandatory order for delivery.

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54 On appeal, Star-Trans have pointed to Norske-Tech`s pursuit of the action even after the delivery up of the cargoes as being indicative of Norske-Tech`s intention not to pursue arbitration proceedings. Norske-Tech did not at any time reserve their right to arbitrate. Even after having obtained an order for delivery, Norske-Tech proceeded to file a statement of claim in S 1864/93. Norske-Tech then asked Star-Trans` solicitors to file their defence. There was no indication that Norske-Tech were considering arbitration as an alternative, even after Star-Trans filed S 1898/93.

55 In October 1993, Star-Trans initiated the call to arbitrate after both S 1864/93 and 1898/93 had already been commenced by the respective parties. They changed their minds apparently upon realizing that a Finnish arbitrator had been nominated by Norske-Tech/PT Riau This was ostensibly because of the high costs involved. It may be true that there was also no other action taken by Norske-Tech/PT Riau after October 1993 which was inconsistent with an intention to refer all disputes to arbitration. However, it appears to us that their prior conduct had clearly indicated that they had no intention to have recourse to arbitration. Both Norske-Tech and Star-Trans had separately commenced proceedings in 1993. In doing so, neither party had met with any objections from the other as regards their apparent abandonment of the arbitration clause in contract 6021. Thus, when Star-Trans subsequently sought to raise the possibility of referring the dispute to arbitration, this would have constituted an attempt to secure a fresh agreement to arbitrate. In the premises, the pivotal question, as we see it, is whether there was a fresh agreement to arbitrate.

56 (ii) Fresh agreement to arbitrate?

57 Counsel for Star-Trans contended that there was no fresh agreement to arbitrate as the parties were still negotiating on the details of the arbitration. He

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relied primarily on **The Benja Bhum** [1994] 1 SLR 88 . In that case, LP Thean JA held that while the parties may have agreed in principle to refer the claims to arbitration, the terms of the agreement had not been confirmed at that time. In any event, the learned judge opined that there was at least a doubt as to whether there was, at the time, a concluded valid and binding agreement between the parties to refer the claim to arbitration.

58 Essentially, Star-Trans` argument was that the original arbitration clause in contract 6021 no longer had effect and any proposed arbitration would have to be governed by a new set of agreed conditions. Norske-Tech/PT Riau had unilaterally expressed their intention to refer the claims to arbitration under the ICC Rules. Moreover, as in ***The Benja Bhum*** , there were still outstanding matters, such as whether Speditor would agree to refer matters to arbitration, and whether Star-Trans` proposed reference to arbitration in a manner other than under the ICC Rules was acceptable. Counsel for Star-Trans thus submitted that there was no concluded agreement to arbitrate. According to Norske-Tech/PT Riau, however, there were no outstanding issues since the entire arbitration clause in contract 6021 was revived and incorporated. As such, the agreement was that which the parties had earlier settled on - to refer the disputes to arbitration under the ICC Rules.

59 It is necessary to examine carefully Star-Trans` call to arbitrate in their fax transmission of 8 October 1993, which we have set out in full earlier, as well as the subsequent exchange of correspondence. Star-Trans` fax of 8 October 1993 was headed `Contract No 6021`. Its contents suggest that they were not seeking to revive the arbitration clause in its entirety. Rather, they proposed that `both parties ... come to an agreement on the future conduct of this matter`. They suggested that `issues relating to demurrage, costs, expenses and the alleged breaches of [contract 6021] should be referred to arbitration`. Furthermore, in

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order to save costs, they proposed that the arbitration could be conducted `in a manner other than under the ICC Rules` and that it be conducted in Singapore.

60 In a subsequent fax dated 27 October 1993, Star-Trans` solicitors asked whether Norske-Tech would be `inclined towards referring this dispute to arbitration pursuant to the terms of the contract` (ie contract 6021). However, in the same letter, Star-Trans` solicitors did advert to their earlier proposal for the arbitration to be conducted in a manner other than under the ICC Rules. The language used may have been somewhat ambiguous or even contradictory. Even so, it may be inferred that Star-Trans were still attempting to secure Norske-Tech`s agreement to arbitrate in a manner other than under the ICC Rules. Norske-Tech`s solicitors responded on 1 November 1993 to say that Norske-Tech would proceed to arbitration `pursuant to the terms of the contract, namely, under the ICC Rules`. Star-Trans did not reply until 17 March 1994. By then, Norske-Tech had already notified Star-Trans of their intention to appoint a Finnish arbitrator. On 17 March 1994, Star-Trans requested that Norske-Tech inform them which claims Norske-Tech intended to refer to arbitration. Star-Trans also stated their objection to Norske-Tech`s choice of a Finnish arbitrator. Norske-Tech`s response of 21 March 1994 was that as far as they were concerned, the parties had agreed to proceed to arbitration.

61 From the exchange of correspondence, it is apparent that the parties were at cross-purposes. We are persuaded by Star-Trans` contentions that there was no concluded agreement to arbitrate. Even accepting that Star-Trans had sought to revive the arbitration clause in contract 6021, their proposal was in the form of an invitation to treat. Norske-Tech`s response would thus amount to no more than an offer to arbitrate, the terms of which Star-Trans did not wholly accede to. As Star-Trans had proposed a different mode of arbitration, the parties were still very much in the process of negotiation. The terms of their fax of 8 October

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1993 clearly acknowledged that the arbitration clause was no longer binding on the parties.

62 It may also be pertinent to note that throughout the correspondence exhibited, there is no indication that any disputes under the performance guarantee would be the subject of any proposed reference to arbitration. The initiating proposal to arbitrate by Star-Trans of 8 October 1993, headed `Contract No 6021`, mentioned that `both parties should ... come to an agreement on the future conduct of this matter`. It seems to us that these references clearly pertain only to Norske-Tech and Star-Trans. It was only in a fax transmission of 31 December 1993 from Norske-Tech`s solicitors that a cursory reference to the `PT Riau Project` was included in the heading to the fax. Yet, even in the ensuing correspondence, there was never any mention of PT Riau`s involvement. From the final piece of correspondence, a fax from Norske-Tech`s solicitors dated 21 March 1994, they state that `the claims which our clients intend to refer to arbitration include all matters presently in dispute between our respective clients in relation to the contract`. Once again, there was no mention of the performance guarantee, or of PT Riau.

63 In any event, as we have noted above, when the first two sets of proceedings were commenced in September 1993, both Norske-Tech and Star-Trans were quite content not to voice any objections over each party`s apparent disregard of the arbitration clause. Consequently, as with the court`s ruling in ***The Benja Bhum*** , there remains doubt as to whether a valid and concluded written agreement to arbitrate was in existence. Thus, s 7 of the Act cannot be invoked.

64 **(3) Inherent jurisdiction**

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65 The court retains the inherent jurisdiction to order a stay of court proceedings in favour of arbitration. Nevertheless, the jurisdiction is a residual one, principally confined to cases not covered by the statutory provisions (***Etri Fans Ltd v NMB (UK) Ltd*** [1987] 2 Lloyds` Rep 565).

66 The grounds for invoking this jurisdiction are that the ongoing proceedings are frivolous, vexatious, oppressive or an abuse of process of the court (Mustill & Boyd, ***The Law and Practice of Commercial Arbitration in England*** (2nd Ed) at p 461). Counsel for Norske-Tech/PT Riau has contended that S 660/94 was an abuse of process. With respect, we do not agree. There was no concluded agreement to arbitrate when S 660/94 was commenced. Moreover, S 660/94 was clearly confined to claims which were not the subject matter of S 1898/93.

67 In the result our judgment is that Norske-Tech should have succeeded in the court below only on the discharge of the ex-parte injunction against which Star-Trans did not appeal. Accordingly, we allow the appeal with costs here and half of the costs below.

68 There will be the usual order for the security deposit to be released to Star-Trans or their solicitors.

69 ***Appeal allowed*** .

Karthigesu JA
L P Thean JA

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Michael Hwang and Vivian Ang (Allen & Gledhill) for the appellants
Molly Lim and Roland Tong (Wong Tan & Molly Lim) for the respondents

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